Supreme Court, U.S.
FILED
MAY 17 1995
OFFICE OF THE CLERK

(2)

No. 94-1696

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MAUREEN HANSEN, *et al.*,

Petitioners,

v.

WESTERVILLE CITY SCHOOL DISTRICT,
BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

RANDOLPH C. WISEMAN
Counsel of Record
BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
Attorney for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

27P

TABLE OF CONTENTS

Page No.

STATEMENT OF THE CASE 1

ARGUMENT 6

I. Certiorari Should Be Denied Because Petitioners Do Not Raise Issues Of Overriding Public Importance 6

II. The Sixth Circuit Correctly Applied The Law Of Summary Judgment And The Petitioners Suffered No Constitutional Deprivation 7

A. The Petitioners' "Disputed Facts" Are Not Material 8

1. First Amendment Claims Of Rood and Huffman: Removal From Meeting 8

a. The Board's Public Participation Policy Is A Valid Time, Place, Manner Restriction 9

2. First Amendment Claims of Remaining Petitioners: Denial Of Reentry 16

B. Respondents Are Entitled To Immunity 22

C. The Seventh Amendment Issue Was Not Raised Below 22

III. CONCLUSION 22

TABLE OF AUTHORITIES

Page No.

CASES

Anderson v. Creighton, 483 U.S. 635 (1978)..... 22
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)7, 21
City of Madison, Jt. School Dist. v. Wisconsin Employ. Rel. Bd., 429 U.S. 167, 180 (1976)..... 13
Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)..... 9, 10
Collins v. Walden, 613 F. Supp. 1306, 1317 (D.C. Ga. 1985)8
Etalook v. Exxon Pipeline Co., 831 F.2d 1440, 1447 (9th Cir. 1987)..... 22
Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 13
Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981)..... 9, 15
Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989); Wright v. Anthony, 733 F.2d 575 (1984)..... 9
Love v. King, 784 F.2d 708, 711 (5th Cir. 1986) 22
Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)..... 7, 13
Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 290 (1984)..... 12
Monnell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 691 (1978)..... 17
Patrick v. Burgett, 486 U.S. 94, 99, n. 5 (1988)..... 22
R.E. Cruz, Inc. v. Bruggeman, 508 F.2d 415 (6th Cir. 1975)21
Rice v. Sioux City Mem. Park Cemetery, 349 U.S. 614 (1955) 7
Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989)6

CASES (continued)

Page No.

Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995, 997 (E.D. Mo. 1987) 10, 11
White v. City of Norwalk, 900 F.2d 1421, 1426 (9th Cir. 1990) 13

STATEMENT OF THE CASE

The Petitioners are members of a loosely-knit organization known as Citizens Against Tax Waste ("CATW"), which was formed in 1988. (R.* *: Huffman Dep. at I-110; R. *: Rood Dep. at 52). They opposed several levies sought by the Respondent Westerville City School District Board of Education ("the Board") in 1988, two of which were defeated in May and August of that year. In opposing the levies, members of CATW appeared and spoke at every Board meeting between August of 1988 and May of 1989. (R. *: Rood Dep. Ex. 2.; R. *: Huffman Dep. at II-57-59).

The events relevant to this Petition began at a public meeting of the Board on September 12, 1988 at which Petitioner Rood (among other Petitioners) was in attendance. Prior to that meeting, Respondent Miller, then President of the Board, announced that there would be forty-five minutes allotted for public participation. During the "Communications" section of the meeting, five speakers (many of whom opposed the levy) were recognized to speak and consumed the allotted time. (R. 45, Ex. 4, Claphan Aff. Ex. D: Minutes Sept. 12, 1988 Board Meeting at 8294). Significantly, Mr. Rood did not seek to address the Board during this time. (R. 45, Ex. 1, Miller Aff. at ¶ 6). When that time had elapsed, the President announced the conclusion of the public participation period, stating that after a five minute

---

* This record entry reflects that several depositions were filed with the District Court and journalized on June 24, 1992, however, these entries were not assigned docket numbers.

break the meeting would then resume with the next agenda item. (R. 44, Jt. Ex. 1; R. *: Rood Dep. at 289).

Upon return from the recess, Mr. Rood interjected and insisted that the Board continue to permit spectators to address the Board. (R. 44, Jt. Ex. 1; R. *: Rood Dep. at 120). When the Board declined to accede to his demands, Rood yelled and paced about the podium for over two and one-half minutes, preventing Mr. Chris Wanner, the Director of Pupil Services, from making his presentation in accordance with the Board's agenda. (R. 44, Jt. Ex. 1.)

After a temporary adjournment due to Rood's behavior, Dr. Miller stated that the Board would allow an additional fifteen minutes for public comment after the meeting. (Videotape Sept. 12, 1988 Board Meeting (R.44, Jt. Ex. 1"). Rood, however, again loudly interrupted the meeting to demand that people who wished to speak be permitted to do so at that time. (Id.) His interjection at that point continued for nearly two minutes. (Id.)

During this interruption, Petitioner Hansen approached the podium and began to speak without having been recognized. (Id.) She was ruled out of order, but continued to speak. (Id.) The presiding officer at the Board meeting permitted her to complete her remarks. (Id.) Following her comments, Mr. Chris Wanner again attempted to make his presentation as scheduled, but Rood again interrupted him, preventing him from doing so. (Id.) After about one minute had passed and Rood refused to yield to Mr. Wanner (the recognized speaker), a Westerville City police officer escorted Plaintiff Rood from the hall. (Id.)

At the conclusion of this meeting an additional period

for public participation was allowed, during which another five speakers addressed the Board, including Mr. Rood. (R. 44, Jt. Ex. 1; R. 45, Ex. 4, Claphan Aff. Ex. D: Minutes Sept. 12, 1988 Board Meeting at 8231.) Of the ten (10) speakers who addressed the Board, five (5) were members of CATW. (R. 45, Ex. 8, Orr Dep. Ex.: Speaker Charts).

The second event occurred at a public Board meeting held on October 24, 1988. Because of dramatically increased public participation at the Board meetings, the Board instituted, at the meeting of October 10, 1988, a new public participation policy which opened the floor for public comment for forty-five minutes and required those in attendance to state their desire to speak on a sign-up sheet available prior to the meeting. All of the Petitioners knew of the procedure and understood that compliance was necessary in order to speak. See, e.g., R. *: Rood Dep. at 70; R. *: L. Waggoner Dep. at 103; R. *: Ward Dep. at 48; R. *: Bean Dep. at 87; R. *: S. Bresee Dep. at 63-64.

Due to the large number of people who had indicated a desire to address the Board by submitting a sign-up sheet, however, there was insufficient time to accommodate all who wished to speak. Consequently, Board President Miller stated that not all who wished to speak could be accommodated, and that preference would be given to those who had never spoken before. (R. 44, Jt. Ex. 2: Videotape Oct. 24, 1988 Board Meeting ("R. 44, Jt. Ex. 2")). Dr. Miller also reiterated the ground rules for participation. (R. 44, Jt. Ex. 2).

A roughly equal number of pro- and anti-levy individuals spoke during the public participation period that

evening. Near the end of the meeting, Dr. Miller announced that time would permit only two more speakers, and recognized Petitioner Del Waggoner, a well-known CATW member, allowing him to speak. Upon the conclusion of Mr. Waggoner's remarks, Mr. Huffman, who was not among those recognized to speak and then took the podium. (R. *: Huffman Dep. at II-69; R. *: Rood Dep. at 349-50). Despite repeatedly being ruled out of order by Dr. Miller, Mr. Huffman refused to yield. Instead, he continued to protest until receiving an answer to his question, at which time he left the room voluntarily with Respondent Tiburzio, a Westerville Police Officer. (R. *: Huffman Dep. at II-76-77). Mr. Huffman was later arrested for disturbing a lawful meeting.

Immediately following Petitioner Huffman's departure, Petitioner Rood, who had spoken at most meetings since April, 1988, (R. *: Rood Dep. at 55-56), commandeered the podium and refused to yield despite repeatedly being ruled out of order.[1] (Id. at 295, 315; R. 44: Jt. Ex. 2). Mr. Rood was escorted from the meeting by Westerville Police Officer Tiburzio. Both in and outside the auditorium, Petitioner Rood struggled with Officer Tiburzio and was arrested for disturbing a lawful meeting and for resisting arrest. (R. *: Tiburzio Dep. at 93, 109-110; R. *: Huffman Dep. (12/21/91 Dep.) at 6-8). Several members of the group followed Messrs. Huffman and Rood to the foyer and, after the arrests were made and the pair were removed

[1] It is undisputed that Petitioner Rood failed to submit a sign-up sheet and was not recognized to speak during the Board's public participation period.

from the building, returned to the meeting. (R. *: Bean Dep. at 166-67; R. *: Ward Dep. at 28).

After the Petitioners returned from the foyer, the final speaker recognized by the Board, Jack Sandman, was completing his statement. (R. *: Ward Dep. at 26, 30). At that time, despite the announcement that the public comment period was closed, (R. *: Bean Dep. at 61-62), Petitioner Hansen approached the podium, began to speak, and refused to yield despite being ruled out of order. (R. *: L. Waggoner Dep. at 111, 119; R. *: Hansen Dep. at 121). She was then escorted from the room, though she was not placed under arrest. (R. *: Bean Dep. at 175; R. *: Tiburzio Dep. at 126-27). As Petitioner Hansen was led from the auditorium, several other members of the group left, for a second time, to observe the activities in the foyer. (R. *: Bean Dep. at 176). While in the foyer, members of the group continued to talk among themselves of the possibility of being granted permission to speak in the meeting despite the fact that the public comment period had expired. (Id. at 177-79). Officer Tiburzio stood nearby and within hearing during this conversation. (Id. at 177).

After conversing, Petitioners reentered the auditorium hoping to persuade the Board to allow additional public comment. (Id. at 180-81). Lou Waggoner then took the podium, began speaking, and was ruled out of order. (Id. at 181-82). Three uniformed officers then entered the auditorium and escorted the Petitioners to the foyer and requested them to leave the premises. (Id. at 184, 186). None of the Petitioners attempted to reenter the auditorium for a third time. (Id. at 188).

ARGUMENT

I. Certiorari Should Be Denied Because Petitioners Do Not Raise Issues Of Overriding Public Importance.

In determining whether it will exercise its discretion to review a case, this Court considers, inter alia, whether "a United States court of appeals has rendered a decision in conflict with another United States court of appeals on the same matter," or whether a "United States court of appeals has decided a question of federal law which has not been, but should be, settled by this Court. . . " Rules of the Supreme Court of the United States 10.1(a), (c).

The Petitioners concede that none of these standards is met in this case. First, they admit that the Sixth Circuit correctly stated the applicable standard for summary judgment. Petition in Support ("Pet.") at 25. The "Petitioners have no quarrel with [the standard articulated by the Sixth Circuit] as it appears to be a reasonable statement of the current rule." Id. Thus, the Petitioners do not argue that the law of summary judgment in the Sixth Circuit is in any way defective or inconsistent with the decisions of this Court. See Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989).

Nor is there any issue of general application to justify review in this case because the Petitioners state that their "disagreement with the Sixth Circuit is that they repeatedly failed to apply the law of summary judgment." Pet. at 25. There is no claim that this case is but one instance of a systematic failure of the Sixth Circuit to apply the law of

summary judgment or that the case raises recurring themes the treatment of which is inconsistent among the United States courts or that is in need of clarification. Indeed, the Petitioners focus exclusively on the peculiar facts of this case. Supreme Court review is particularly inappropriate, however, where the primary issues raised are academic or episodic. See Rice v. Sioux City Mem. Park Cemetery, 349 U.S. 614 (1955).

II. The Sixth Circuit Correctly Applied The Law Of Summary Judgment And The Petitioners Suffered No Constitutional Deprivation.

Summary judgment may issue where there is no genuine issue as to any material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Material" facts are those "that might affect the outcome of the suit under the governing law. . . . Factual disputes that are irrelevant or unnecessary will not be counted." Id. Moreover, a dispute is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. A nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

"In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Liberty Lobby, 477 U.S. at 254. A plaintiff may not defeat summary judgment on a conspiracy claim "by merely asserting that the jury might . . . disbelieve the defendant's denial." Id. at 256. Instead, where

allegations of conspiracy are directly controverted by affidavit evidence, the burden under Rule 56(e) shifts to the plaintiff to adduce significant probative evidence to support the claim of conspiracy. Collins v. Walden, 613 F. Supp. 1306, 1317 (D.C. Ga. 1985).

A. The Petitioners' "Disputed Facts" Are Not Material.

The various facts claimed to be in dispute are not material to resolution of the case because the Petitioners cannot show that they suffered any constitutional deprivation at the hands of the Board or the individual Board Respondents. This is because the Board acted pursuant to a valid time, place, and manner public speaking policy which the Petitioners violated. Thus, even assuming the truth of the Petitioners' allegations as the Sixth Circuit did, Petitioners fail to show that they suffered any harm.

1. First Amendment Claims of Rood and Huffman: Removal From Meeting.

Petitioners Huffman and Rood assert that their First Amendment rights were violated by the application of the Board's public participation policy and their consequent removal from the meeting of October 24, 1988. However, because the Board's public participation policy was a content-neutral regulation of speech, was narrowly tailored to serve a significant governmental interest, and allowed alternative avenues of communications, it is constitutionally valid. Clark

v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Petitioners' failure to comply with the procedures of the policy caused their expulsion from the meeting.

a. The Board's Public Participation Policy Is A Valid Time, Place, Manner Restriction.

The Board policy provides for a maximum of 30 minutes of unscheduled lay participation, five minutes per speaker. Id.[2] Prior to the October 24, 1988 meeting, the policy was modified to allow forty-five minutes of public comment and to provide for a sign-up procedure for those who wished to speak.

To constitute a valid time, place, and manner restriction, the Board's policy may not be based upon either the content or the subject matter of the speech. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981). The principal inquiry is whether the regulation has been adopted because of "disagreement with the message it conveys" or whether it is unrelated to the content of the expression. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). A policy need not be the least restrictive or intrusive means of obtaining the interest to be considered "narrowly tailored" as long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation" and the regulation is "not substantially

---

[2] Other courts have upheld similar content-neutral regulations. See White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990); Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989); Wright v. Anthony, 733 F.2d 575 (1984); Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995 (E.D. Mo. 1987).

broader than necessary to achieve the government's interest." Id. at 798-99. Finally, the policy must leave open "alternative channels for communication of the information." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

The Board's public participation policy serves a legitimate purpose without reference to the content of speech. First, all speakers must comply with the Board's procedures irrespective of the proposed topic. The only limitation placed on a speaker is the time each is allowed to speak. The mere limitation on the number of individuals who may speak neither advances nor inhibits the communication of a particular point of view because it restricts the timing, not the content, of speech. Because the purpose of the policy was to balance the community's interest in the efficient conduct of official business with the Board's interest in the maintenance of orderly and informative public meetings, the policy is valid. Petitioners present no competent evidence establishing that the policy was adopted or enforced for any purpose other than to serve these interests. Moreover, the undisputed facts show that the application of the policy resulted in a balanced presentation of opposing views at all meetings. Accordingly, their claims must fail. See Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995, 997 (E.D. Mo. 1987 (rejecting challenge to constitutionality of ordinance because it did not prevent plaintiff from speaking based upon "content of her message," but rather on "the timing of the [] speech.").

Petitioners claim that the Board's time limit policy disproportionately limited their access to speak publicly at

Board meetings. However, during the October 10, 1988 meeting, six of eleven persons recognized to address the Board were CATW members, including Petitioners Bean, Hansen, Huffman, Rood, and D. Waggoner. (R. 45, Ex. 8, Orr Dep. Ex.: Speaker Charts). At the October 24, 1988 meeting, six of thirteen individuals recognized were members of CATW. (R. 45, Ex. 8, Orr Dep. Ex.: Speaker Charts). Petitioners admit that the Board's policy prevented persons other than CATW members from speaking. (R. *: Rood Dep. at 122). Therefore, not only did CATW members enjoy virtual parity in speaking opportunities, no disproportionate burden devolved upon them as a result.

Even if the policy did disproportionately affect Petitioners, that alone is insufficient to invalidate the policy. When a regulation serves a legitimate objective, it is not unconstitutional simply because it has a disparate impact on a particular viewpoint. A regulation that serves purposes unrelated to content is not invalid "even if it has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791; see also Tannenbaum, 663 F. Supp. at 997 (rejecting plaintiff's claim that ordinance was strictly enforced against here because she failed to show that she was "singled out and compelled to comply with the law while others similarly situated ha[d] not been so compelled."). Accordingly, Petitioners' failure to adduce affirmative evidence that the Board's enforcement of the speaker and time limitations were intended to prevent anti-levy speakers from speaking or that they were applied to them differently than others who were not recognized justified summary judgment in this case.

Petitioners claim that the Board's preference to hear those who had not spoken before was an illicit restriction on their right to speak. But this provision did not restrict Petitioners since CATW members spoke at every meeting relevant to this case. And the Board obtained input from a greater number of individuals, thus expanding the scope of speech within the public participation period. See Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 290 (1984) (a "person's right to speak is not infringed when government simply ignores that person while listening to others."). As there was no content-based restriction on speech, the Board's policy was permissible.

Petitioners also argue that the sign-up policy, instituted after Mr. Rood's disruption of the September 12, 1988 meeting, was intended to limit their speech. The sole evidentiary support for this claim is that the Board had never before followed such a procedure. Yet the factual background of this case explains why strict enforcement had never before been necessary. At the August, 1988 meeting, Petitioner Huffman stated that "there had to be a good 40, 50, 60 people that talked." (R. *: Huffman Dep. at I-108). This was a result of increased public participation in the levy issue. Because of the adverse impact on the Board's ability to conduct business, new procedures had to be developed to limit the number of people who could speak. Significantly, the stricter enforcement of the policy was directed not at the content of the speech but the amount of speech. Accordingly, the evidence in this case does not support the Petitioners' contentions. Under these circumstances, the Petitioners were required to "come forward with more persuasive evidence to

support their claim than would otherwise" have been necessary. Matsushita Indus. Elec. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Their failure to do so justified the grant of summary judgment.

Petitioners argue that because the policy was implemented, in part, as a response to disruptive behavior that it was somehow constitutionally infirm. Yet content-neutral policies regulating conduct, as opposed to speech, are appropriate and do not violate constitutional precepts. White v. City of Norwalk, 900 F.2d 1421, 1426 (9th Cir. 1990) (conduct which interferes with rights of others to speak is proper subject of regulation).

Petitioners even complain that the Board controlled the progress of meetings by use of an agenda and rules of parliamentary procedure. See Pet. at 21. Yet a public body has broad authority to structure the discussion of matters it chooses to open to the public and may limit such matters as it deems reasonably appropriate. City of Madison, Jt. School Dist. v. Wisconsin Employ. Rel. Bd., 429 U.S. 167, 180 (1976). For this reason the Board's "interest in controlling the agenda and preventing the disruption of [its] meetings" are compelling interests that are well within the ambit of its constitutional authority. Jones v. Heyman, 888 F.2d 1328, 1333 (11th Cir. 1989).

The governmental interest in the orderly and efficient conduct of its business while ensuring maximum public participation is a compelling one. Grayned v. City of Rockford, 408 U.S. 104 (1972).[3] The preservation of the

---

[3] See also Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989) (mayor's interest in controlling agenda and preventing the disruption of public

right of all to enjoy equal opportunity to present their views is best effectuated by reasonable restrictions which ensure that government operates efficiently:

> To deny the presiding officer the authority to regulate irrelevant and disruptive behavior at a public meeting [] would cause such meetings to drag on interminably, and deny others the right to voice their opinions.

Jones v. Heyman, 888 F.2d 1328, 1333 (11th Cir. 1989). The Board was not required to grant an unlimited right to speak.[4]

Imposing a time limit and requiring sign-up sheets as a condition for speaking accommodates the competing interests

---

meeting is significant government interest); see also City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 n. 8 (1976); Wright v. Anthony, 733 F.2d 575 (8th Cir. 1984) (public hearing procedure informally limiting speech to five minutes per speaker was a valid time, place, and manner restriction that served significant governmental interest); Parker v. Merlino, 646 F.2d 848 (3d Cir. 1981) (legislative body has significant interest in limiting debate; legislative body must have ability to discharge its primary function, decision-making, in efficient manner); Kucinich v. Forbes, 432 F. Supp. 1001 (N.D. Ohio 1977) (city councilman could be suspended from body for failure to yield).

[4] Indeed,

> [w]e are dealing not with words uttered on the street to anyone who chooses or chances to listen; we are dealing with meetings of the [Board], and with speech that is addressed to [the Board]. Principles that apply to random discourse may not be transferred without adjustment to this more structured situation . . . . [the Board] meting is still just that, a governmental process with a governmental purpose. The [Board] has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the [Board] chambers intact.

White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990).

of efficiency and reasonable public participation because restrictions on conduct, as opposed to speech, leave untouched the full panoply of expressive activity. This solution strikes a balance that maximizes the number of speakers that may be heard while promoting the efficient conduct of official business. It is not enough for Petitioners to argue that allowing them to speak would not have significantly impaired the Board's ability to operate in an efficient and effective manner. Heffron v. Int'l Soc'y For Krishna Consciousness, 452 U.S. 640, 654 (1981). Rather, Petitioners must demonstrate that no disorder would have been created if the Board had allowed any and all comers to exercise a limitless right to speak. Id. They have failed even to attempt to make this showing.

The public participation period was not the exclusive means by which information could be communicated. First and foremost, the policy itself afforded all of the Petitioners ample opportunities to address the Board, as evidenced by the fact that all of them spoke at Board meetings on several occasions.[5] Second, the Board's policy does not limit individual's ability to voice concerns to the board or utilize other means to convey their views to the public. The Board

---

[5] There is no question that persons opposed to the levy were allowed to speak during the public participation period during September and October of 1988. See, e.g., R. *: L. Waggoner Dep. at 36-7; R. *: Keller Dep. at 26; R. *: Brown Dep. at 13; R. *: S. Bresee Dep. at 50; R. *: J. Bresee Dep. at 13-15; R. *: Hansen Dep. at 84. Indeed, Mrs. Hansen could not identify any person who had spoken more during the public participation periods than Petitioner Rood, Petitioner Huffman, or herself. (R. *: Hansen Dep. at 164). It is delusional to suggest that the policy was administered "cut off" anti-levy speakers.

often held special meetings which were devoted completely to receiving input from the public. In addition, the Board customarily received correspondence from the public. Indeed, Petitioner McIntyre testified that she placed personal telephone calls to Board members to discuss matters of concern and submitted additional matters to the Board in writing, (R. *: McIntyre Dep. at II-70-80), and Rood freely admits that he discussed the levy with Respondent Miller before the October 24, 1988 meeting. Pet. at 16.

2. First Amendment Claims Of Remaining Petitioners: Denial Of Reentry.

The remaining Petitioners claim First Amendment violations arising from the alleged refusal to allow them to reenter the October meeting.[6] They argue that Officer Tiburzio was an employee of the Board,[7] was instructed by the Board, "engaged in his various acts in the presence of the Board," and thus conclude that his "unconstitutional" acts were somehow those of the Board. In addition, they claim

---

[6] This claim is advanced by Petitioners McIntyre, Hansen, Ward, Brown, J. Bresee, S. Bresee, L. Waggoner, Keller, and Bean. Petitioner's App. Brief at 37-38.

[7] Although Officer Tiburzio's employment status is irrelevant, it is clear that he was not an employee of the Board. First, though Officer Tiburzio was assigned to cover the Board meeting, Westerville Police Chief Shaw's uncontroverted testimony was that policemen hired by entities such as the Board remain employees of the Westerville Police Department and retain the sole authority to effect an arrest on unruly individuals. (R. *: Shaw Dep. at 41-42).

that they were denied reentry solely because they were members of CATW.

First, whether Officer Tiburzio was an employee of the Board's is immaterial to the this case since respondeat superior will not create section 1983 liability absent a municipal policy or custom. Monnell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 691 (1978). Second, the Petitioners were not denied reentry; they were allowed to reenter the meeting hall twice, as a group, before reentry was barred. Supra at 5. Indeed, Mrs. Hansen was never denied reentry. Petitioners adduce no evidence that the decision to bar reentry the third time was based on the content of their speech.[8] Moreover, when reentry was finally denied, the record proves that the denial was based on Petitioners' misconduct.: Petitioners openly planned, and in fact did enter and further disrupt the meeting. Under these circumstances, the refusal to allow Petitioners to reenter was a legitimate

---

[8] Petitioners offer only the edited deposition testimony of Officer Tiburzio for the proposition that he threatened Petitioners Hansen and Waggoner with arrest if they spoke against the levy. The unedited testimony conclusively refutes this contention:

> And I explained to them, I said `look, you can't do that.' I said, `If you continue to do something like that, disturb a lawful meeting, I'll have to -- I would have to arrest you at that point in time.

(R. *: Tiburzio Dep. at 121 (emphasis added)). Thus, Officer Tiburzio's testimony reflected his belief that Petitioners' conduct posed a threat to the orderly continuation of the meeting as well as to the restoration of order. (Id. at 120). That Petitioners rely upon editing the emphasized portion of Tiburzio's sworn statement out of the record belies their assertion that there is a dispute as to material facts in this case. Accordingly, the District Court correctly dismissed this portion of the case.

exercise of police power and violates no constitutional right.[9]

Even assuming that reentry should not have been denied, Petitioners fail to allege or prove that the Board had a policy or custom to exclude protesters from meetings. Indeed, CATW members spoke at all of the contested meetings of the Board. It is thus obvious that no policy or custom existed to deny entry to members of CATW.

Petitioners also attempt to impute liability to the Board by arguing that Officer Tiburzio took instructions from the Board at the October 24, 1988 meeting.[10] See Pet. at 13-15 & nn. 14, 15. However, Officer Tiburzio testified that the only "meeting" he ever had with a Board member was a brief conversation immediately prior to the September 12, 1988 meeting, which was before the change in the public participation policy. (R. *: Tiburzio Dep. at 61, 73-75). He never discussed individuals or a general policy of exclusion of CATW members. (Id. at 74-76). In addition, this testimony

---

[9] See Jones v. Heyman, 888 F.2d 1328, 1332, 1334 (11th Cir. 1989) (arrest for disruptive behavior at City Commission meeting justified as reasonable to effect time, place, and manner restrictions; mayor's actions to limit speaker were reasonable attempt to enforce agenda item); Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995, 997 (E.D. Mo. 1987) (arrest for disruptive behavior in city council meeting justified to enforce compliance with content-neutral restriction on speech).

[10] In their brief, the Petitioners discuss Officer Tiburzio's conduct in removing and arresting some of the Petitioners in the context of probable cause, and quote from the Sixth Circuit opinion dealing with the probable cause issue. It should be noted that the Sixth Circuit, and the Petitioners, dealt with this issue below in the context of their claim for false arrest, which they now apparently abandon. The Petitioners here raise the issue of probable cause in the context of Officer Tiburzio's independence from the Board, an issue relevant to the conspiracy claim. Pet. at 23-24.

is perfectly consistent with that of Dr. Husarik, who stated that he had not spoken with Officer Tiburzio prior to the October 24, 1988 Board Meeting. (R. 45, Ex. 2: Husarik at ¶ 8).[11] Petitioners' attempt to impute the brief discussion before the September 12 meeting to the October 24 meeting is just another example of misstating the record to induce the Court to review this case.

Petitioners also rely on Officer Tiburzio's deposition testimony to argue that he and Respondent Husarik agreed to a hand signal to trigger intervention. Pet. at 13-15 & nn. 14, 15. Yet Tiburzio specifically denied that the signal was arranged before the meeting. (R. *: Tiburzio Dep. at 81). Moreover, whether such a signal existed is irrelevant to the Petitioners who state reentry claims. Assuming, arguendo, that such a signal were prearranged, at most it would indicate a desire for intervention at the podium, it provides no support for a conclusion that there existed a policy or custom to exclude CATW members from reentering the meeting.[12] Moreover, Tiburzio testified that he drew no conclusion from

---

[11] Officer Tiburzio testified:

> I asked him what my specific duties were at this -- at this function, and it was to make sure that there were no problems between the proponents, or the people that were for a school levy, and those against a school levy. And that was it.

(R. *: Tiburzio Dep. at 74-75).

[12] In addition, the officers' decision to restrain Petitioners from yet a third disruption of the meeting was justified as an exercise of reasonable police power independent of any "prearranged" hand signal by the Board.

the existence of the hand signal other than that his presence was requested. (Id. at 84-85). Based upon the very evidence Petitioners proffer to support their claim, it is at once clear that the hand signal was not prearranged and that it is, in any event, irrelevant to the Petitioners' claim for a denial of reentry.

Even if a claim were stated, Petitioners failed to adduce any evidence to support their contention. No Petitioner has provided a factual basis for the conspiracy claim.[13] The only explication of the conspiracy theory comes

---

[13] Indeed, every Petitioner in this case testified that they "believed" or were of the "opinion" that a conspiracy existed. None could cite a single fact to support their subjective contention. See, e.g., R. 49, Ex. J: Bean Aff. ¶ 16; R. 49, Ex. K: J. Bresee Aff. at ¶¶ 18, 21; R. 49, Ex. L: S. Bresee Aff. at ¶ 14; R. 49, Ex. M: Brown Aff. at ¶ 22; R. 49, Ex. N: Hansen Aff. at ¶ 25; R. 49, Ex. O: Huffman Aff. at ¶¶ 34, 37; R. 49, Ex. P: Keller Aff. at ¶ 8; R. 49, Ex. Q: McIntyre Aff. at ¶¶ 19, 46; R. 49, Ex. R: Rood Aff. at ¶¶ 21, 13; R. 49 Ex. S. Waggoner Aff. at ¶ 19.

> In addition to the lack of factual basis:
> Affidavits speculating as to motivations but containing no factual support do not conform to [Rule 56(e)], and statements prefaced by the phrases "I believe" or "upon information and belief" or those made upon an "understanding" are properly subject to a motion to strike. Moreover, affidavits which contain conclusions of law, ultimate facts, assertions, arguments and inferences derived from opposing party's affidavits similarly must be disregarded'

Carey v. Beans, 500 F. Supp. 580, 583 (E.D. Pa. 1980), aff'd, 659 F.2d 1065 (3d Cir. 1981) (citation omitted). See also Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990) (admissibility of evidence on summary judgment subject to same rules governing admissibility at trial); State Mut. Life Assur. Co. v. Deer Creek Park, 612 F.2d 259, 264 (6th Cir. 1979) ("Affidavits composed of hearsay and opinion evidence do not satisfy Rule 56(e) and must be disregarded.").

from Petitioners' counsel. Where the plaintiffs' version of the facts is not presented in any deposition, affidavit, or other document on file except the pleadings, summary judgment is appropriate. R.E. Cruz, Inc. v. Bruggeman, 508 F.2d 415 (6th Cir. 1975). Petitioners' failure to identify the factual predicate to support or articulate the theory of their conspiracy claim required the Court below to dismiss their claim.

Finally, Petitioners' conspiracy claim is supported by implausible inferences. The conspiracy is said to consist of providing assurances that Petitioners would be able to speak at the October 24, 1988 meeting, only then to ignore Petitioners, thus inciting their proclivity for disruptive behavior, justifying their arrest in full view of live television, and discrediting them. See Pet. at 12-13. But the probability of such events coming to pass in the sequence proposed would require the sequential occurrence of contingent events over which Respondents could have had no control. Yet this Court advises that only "legitimate inferences from the facts" are to be construed in the nonmovant's favor, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and such inferences are only those "that a reasonable jury" would consider in reaching a verdict. Id. at 248 (emphasis added). Instead, the nonmovant "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." Anderson at 256. When the necessary inference is so tenuous that it rests merely upon speculation and

---

Thus, Petitioners' affidavits are of no evidentiary value and do not support their claim of conspiracy.

conjecture, it is the duty of the court to withdraw the case from the jury." Love v. King, 784 F.2d 708, 711 (5th Cir. 1986).

B. Respondents Are Entitled To Immunity.

Respondents Miller, Hayfield, and Husarik are entitled to qualified immunity for the conspiracy claims asserted against them individually since Petitioners cannot demonstrate that they had a clearly established right to violate the public participation policy. Anderson v. Creighton, 483 U.S. 635 (1978).

C. The Seventh Amendment Issue Was Not Raised Below.

The Petitioners argue for the first time that the grant of summary judgment denied them their seventh amendment right to a trial by jury. Pet. at 28, 29. Having failed to raise this issue below, certiorari jurisdiction is inappropriate. See Patrick v. Burgett, 486 U.S. 94, 99, n. 5 (1988). In addition, it is well settled that summary judgment, properly granted, does not violate the seventh amendment. Etalook v. Exxon Pipeline Co., 831 F.2d 1440, 1447 (9th Cir. 1987).

III. CONCLUSION

The Petitioners, faced with a properly supported motion for summary judgment, produced no affirmative evidence to support their claim of conspiracy. Instead, they

proffer only conclusions and innuendo, utterly ignoring record evidence and the fact that the public participation policy provided them and other members of CATW with ample opportunity to speak at Board meetings. Thus, summary judgment was appropriately granted.

Respectfully submitted,

Randolph C. Wiseman
BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
Attorney for Respondents Westerville City School District Board Of Education, Debbie Collins, Thomas Fawcett, Donna Baker, and David Coffman, In Their Official Capacities, and Don W. Miller, J. Michael Hayfield, and Ernest A. Husarik, In Their Official And Personal Capacities.